

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of STEPHANIE COOK and DEPARTMENT OF HOUSING & URBAN
DEVELOPMENT, Oklahoma City, OK

*Docket No. 98-485; Submitted on the Record;
Issued December 13, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's claims for consideration of the merits.

The Board has duly reviewed the case on appeal and finds that the Office did not abuse its discretion by refusing to reopen appellant's claims for consideration of the merits.

Appellant, then a 42-year-old program assistant, was working in the Alfred P. Murrah Federal Building on April 19, 1995 when the building was bombed. The Office accepted that she sustained neurotic disorder and soft tissue injuries as a result of the blast. By decision dated June 20, 1996, the Office found that appellant was not disabled due to her accepted conditions from April 24 to May 24, 1996 as her bile duct stone was not causally related to her accepted injuries. Appellant received a schedule award for a 23 percent permanent impairment of her left upper extremity on October 24, 1996. Appellant elected to receive her schedule award payment in a lump sum on October 29, 1996. The Office provided her with a lump sum of \$19,772.38 for the period of November 10, 1996 to December 27, 1997.

In a letter dated June 18, 1997, appellant noted that she received pay from the employing establishment from April 19 to July 10, 1995, that from July 10, 1995 to February 8, 1996 she was either working or was furloughed, that she received compensation benefits from February 8 to April 26, 1996 and that the Office denied compensation benefits from April 29 to June 4, 1996. She noted that the Office stated that she had intermittent wage loss from June 4 to August 11, 1996. Appellant requested compensation from April 19, 1995 to August 11, 1996 and requested reconsideration of all of the above issues.

The Office noted on June 23, 1997 that appellant had requested reconsideration of its June 20, 1996 decision denying compensation from April 24 to May 24, 1996. By letter dated July 3, 1997, the Office addressed the remainder of the issues raised, specifically noting that no

formal decisions had been issued and that appellant should request a formal decision if she disagreed.

Appellant requested reconsideration on October 8, 1997 stating that she did not understand why the Office did not pay for her injury from the date that it occurred. Appellant also requested reconsideration of the June 20, 1996 decision. By decision dated November 4, 1997, the Office denied appellant's request for reconsideration of the October 24, 1996 decision regarding her schedule award. In the accompanying memorandum, the Office reviewed the factual background of the case and addressed the issue of why appellant was not entitled to a schedule award from April 19, 1995. The Office further noted that appellant had not submitted any evidence in support of her reconsideration request of her June 20, 1996 decision.

Section 10.138(b)(1) of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a point of law; or (2) advancing a point of law or a fact not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office.¹ Section 10.138(b)(2) provides that when an application for review of the merits of a claim does not meet at least one of these three requirements, the Office will deny the application for review without reviewing the merits of the claim.²

In this case, the Office properly noted that appellant had not submitted any evidence or argument in support of her request for reconsideration of the June 20, 1996 decision denying compensation for wage loss from April 24 to May 24, 1996. As this claim was denied due to the lack of medical evidence establishing a causal relationship between appellant's bile duct stone and her accepted employment injuries, appellant's opinion that there is a causal relationship is not sufficient to require the Office to reopen her claim for consideration of the merits.

In support of her request for reconsideration of her schedule award, appellant argued that she is entitled to compensation for her injuries from the date on which the injuries occurred, April 19, 1995, rather than the date utilized by the Office, August 12, 1996, which followed the determination of maximum medical improvement. While the reopening of a case may be predicated solely on a legal premise not previously considered, such reopening for further review of the merits is not required where the legal contention does not have a reasonable color of validity.³

The contention raised by appellant in her October 8, 1997 reconsideration request has previously been raised before and adjudicated by the Board. In the case of *James Kennedy, Jr.*,⁴ the Board found that the period covered by a schedule award commences on the date that the employee reaches maximum medical improvement from the residuals of her employment injury.

¹ 20 C.F.R. § 10.138(b)(1).

² 20 C.F.R. § 10.138(b)(2).

³ *Cleopatra McDougal-Saddler*, 50 ECAB ____ (Docket No. 97-1360, issued May 4, 1999).

⁴ 40 ECAB 620, 626 (1989).

Maximum improvement means that the physical condition of the injured member of the body has stabilized and will not improve further. The determination of maximum medical improvement is not to be based on surmise or prediction of what may happen in the future. A schedule award is appropriate where the physical condition of an injured member has stabilized, despite the possibility of an eventual change in the degree of functional impairment in the member.⁵ The question of when maximum medical improvement has been reached is a factual one which depends on the medical findings in the record and the determination of such date is made in each case upon the basis of submitted medical evidence.⁶ As the law on this point is already settled,⁷ the argument in appellant's October 8, 1997 request for reconsideration does not show that the Office erroneously applied or interpreted a point of law, nor does it advance a point of law with a reasonable color of validity not previously considered by the Office.

The decision of the Office of Workers' Compensation Programs dated November 4, 1997 is hereby affirmed.

Dated, Washington, D.C.
December 13, 1999

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

⁵ *Id.*

⁶ *Eugenia L. Smith*, 41 ECAB 409, 413 (1990).

⁷ *Jerre R. Rinehart*, 45 ECAB 518 (1994); *Joseph R. Waples*, 44 ECAB 936 (1993); *Tonya D. Bell*, 43 ECAB 845 (1992); *Orlanda Vivens*, 42 ECAB 303 (1991).